

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

<b>In the matter of</b>	)	
	)	
<b>Rules and Regulations Implementing the</b>	)	<b>CG Docket No. 02-278</b>
<b>Telephone Consumer Protection Act of 1991</b>	)	
	)	<b>CG Docket No. 05-338</b>
<b>Petition for Rulemaking and Declaratory Ruling</b>	)	
<b>Petition for Rulemaking and Declaratory Ruling</b>	)	

**COMMENTS OF THE  
EDISON ELECTRIC INSTITUTE, THE AMERICAN GAS ASSOCIATION, AND  
THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

**Edison Electric Institute**

H. Russell Frisby, Jr.  
Brandon R. Nagy  
STINSON LEONARD STREET LLP  
1775 Pennsylvania Avenue NW, Suite 800  
Washington, DC 20006  
(202) 785-9100  
(202) 785-9163 (fax)

*Counsel to the Edison Electric Institute*

Aryeh B. Fishman  
Associate General Counsel,  
Regulatory Legal Affairs  
  
EDISON ELECTRIC INSTITUTE  
701 Pennsylvania Avenue, NW  
Washington, DC 20004-2696  
(202) 508-5000

**American Gas Association**

Michael L. Murray  
Deputy General Counsel  
AMERICAN GAS ASSOCIATION  
400 N. Capitol St., NW  
Washington, DC 20001  
(202) 824-7071

*Counsel to the American Gas Association*

Jim Linn  
Managing Director, Information Technology  
  
AMERICAN GAS ASSOCIATION  
400 N. Capitol St., NW  
Washington, DC 20001  
(202) 824-7272

**National Rural Electric Cooperative  
Association**

Tracy P. Marshall  
KELLER AND HECKMAN LLP  
1001 G Street NW, Suite 500  
Washington, DC 20001  
(202) 434-4100  
(202 434-4646 (fax)

*Counsel to the National Rural Electric  
Cooperative Association*

Martha A. Duggan  
Senior Director, Regulatory Affairs

NATIONAL RURAL ELECTRIC COOPERATIVE  
ASSOCIATION  
4301 Wilson Blvd.  
Arlington, VA 22203  
(703) 907-5848

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## SUMMARY

As recognized in the recent *EEI/AGA Declaratory Ruling*,<sup>1</sup> energy utility companies, in their capacity as Critical Infrastructure Industries, use automated and/or artificial or prerecorded voice messages to place important electric and natural gas utility service-related calls and text messages to their customers using numbers supplied to them by their customers. Combined, the Edison Electric Institute (“EEI”), American Gas Association (“AGA”), and National Rural Electric Cooperative Association’s (“NRECA”) members provide service to most of this country. In order to provide this nation with safe, reliable, and efficient service, EEI, AGA, and NRECA members often need to contact their customers to, among other things, warn about planned or unplanned service outages; provide updates about outages or service restoration; ask for confirmation of service restoration or information about the lack of service; or warn about potential service curtailment on account of a failure to make payment.

The relief sought by the Petitioners has no basis in law and should be denied. The Telephone Consumer Protection Act (“TCPA”) is a broad statute and the Commission has flexibility to interpret the TCPA’s “prior express consent” provision. Moreover, the Petition would effectively overturn more than twenty years of Commission precedent, including the recent *EEI/AGA Declaratory Ruling*, in which the Commission found that when energy utility customers provide their cellphone numbers to the utility they thereby expressly consent to receive automated calls and texts reasonably and closely related to their utility service. If granted the Petition will disrupt normal, expected, and desired business communications, will negatively impact both energy utilities and their customers, and will be contrary to the public interest.

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<sup>1</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Blackboard, Inc. Petition for Expedited Declaratory Ruling and Edison Electric Institute & American Gas Association Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (Aug. 4, 2016) (*EEI/AGA Declaratory Ruling*).

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**COMMENTS OF THE  
EDISON ELECTRIC INSTITUTE, THE AMERICAN GAS ASSOCIATION, AND  
THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

The Edison Electric Institute (“EEI”), American Gas Association (“AGA”), and National Rural Electric Cooperative Association (“NRECA”) (collectively, the “Energy Utility Respondents”), on behalf of their member electric and natural gas utilities, hereby submit these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Public Notice released in the above-referenced proceeding on February 8, 2017. With the Public Notice, the Commission seeks comment on a petition for rulemaking and declaratory ruling filed by Craig Moskowitz and Craig Cunningham (Petitioners).<sup>2</sup> Petitioners request that the Commission initiate a rulemaking “to overturn the Commission’s improper interpretation that ‘prior express consent’ includes implied consent resulting from a party’s providing a telephone number to the caller.” For the reasons stated herein, Energy Utility Respondents urge the Commission to deny the Petition.

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<sup>2</sup> *Petition of Craig Moskowitz and Craig Cunningham for Rulemaking and Declaratory Ruling*, CG Docket Nos. 02-278, 05-338 (filed Jan. 22, 2017) (*Petition* or *Moskowitz Petition*).

## **I. The Energy Utility Respondents.**

EEI is the trade association that represents all U.S. investor-owned electric companies. Our members provide electricity for 220 million Americans, operate in all 50 states and the District of Columbia, and directly and indirectly employ more than one million American workers. EEI's member companies invest more than \$100 billion each year to build smarter energy infrastructure and to transition to even cleaner generation sources. In addition to its domestic members, EEI has more than 60 international electric company members, and 250 industry suppliers and related organizations as Associate Members. Organized in 1933, EEI provides public policy leadership, strategic business intelligence, and essential conferences and forums.

AGA, founded in 1918, represents more than 200 state-regulated and municipal natural gas utility companies that deliver clean natural gas to more than 177 million Americans. There are more than 73 million residential, commercial and industrial natural gas customers in the United States, of which 95 percent—more than 69 million customers—receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers. Today, natural gas meets more than one-fourth of the United States' energy needs.

NRECA is the national service organization for America's Electric Cooperatives. The nation's member-owned, not-for-profit electric co-ops constitute a unique sector of the electric utility industry – and face a unique set of challenges. NRECA represents the interests of the nation's more than 900 rural electric utilities responsible for keeping the lights on for more than 42 million people across 47 states. Electric cooperatives are driven by their purpose to power communities and empower their members to improve their quality of life. Affordable electricity is the lifeblood of the American economy, and for 75 years electric co-ops have been proud to keep the lights on. Because of their critical role in providing affordable, reliable, and universally

accessible electric service, electric cooperatives are vital to the economic health of the communities they serve. America's Electric Cooperatives bring power to 75 percent of the nation's landscape and 12 percent of the nation's electric customers, while accounting for approximately 11 percent of all electric energy sold in the United States.

## **II. The Energy Utility Respondents Use Automated Calls and Text Messages for Important Purposes.**

Energy Utility Respondents' members have a strong track record of preparing for many types of circumstances that can affect their ability to generate and deliver energy for both the daily survival and commercial needs of their customers. They work together with federal, state, and local governments and regulators to ensure that they can respond effectively to any service-affecting event. Energy Utility Respondents' members' efforts also include developing and implementing notification programs to provide customers with the best and most-up-to-date information available regarding service issues, whether those issues are the result of planned outages or curtailment, natural disasters, unplanned outages, other emergencies, customer-related problems, such as delinquent bills, that could lead to a cessation of service, or low balance alerts that allow customers to manage utility bills and consumption.

Energy Utility Respondents' members are also keenly aware of the need to use energy resources efficiently in order to make our energy supply more safe and reliable, to protect the environment and conserve natural resources, and to save customers money. Energy Utility Respondents' members constantly work to help homes and businesses get more value from their energy dollar, including by informing their customers about, and encouraging participation in, conservation, energy efficiency, demand response, and other demand-side management programs. All of this is done with the enthusiastic support of and/or under mandates from local

and state governments, state and federal regulators, the federal government, and (in the case of electric cooperatives) their independently elected Boards of Directors.

To provide safe, reliable, and efficient service, Energy Utility Respondents' members often need to contact their customers to: (a) warn about planned or unplanned service outages; (b) provide updates about outages or service restoration; (c) ask for confirmation of service restoration or information about the lack of service; (d) provide notification of meter work, tree-trimming, safety-related meter access, mandatory pipe inspections, or other field work; (e) verify eligibility for special rates or services, such as medical, disability, or low-income rates, programs and services; and (f) provide information about potential brown-outs due to heavy energy usage.<sup>3</sup>

Energy utilities have long used prerecorded message telephone calls and automatic telephone dialing systems to reach their customers about these service-related issues.<sup>4</sup> As utility customers increasingly have transitioned to using wireless phones, utility companies also have transitioned to using new technologies for notifying their customers, including using wireless-only technologies, such as automated text messaging technologies to send service-related information to customers who have provided wireless numbers.<sup>5</sup> Placing automated calls and text messages increases the speed and reliability with which energy companies can disseminate

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<sup>3</sup> *EEI/AGA Declaratory Ruling*, ¶ 30 (citations to the evidentiary record omitted); *see also* *EEI/AGA Declaratory Ruling*, ¶ 11.

<sup>4</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 92-443, 7 FCC Rcd 8752, ¶ 49 (1992) (“1992 TCPA Order”) (“Many public utilities note that they communicate with their customers through prerecorded message calls and automatic telephone dialing systems to notify customers of service outages, to warn customers of discontinuance of service, and to read meters for billing purposes.”); *see EEI/AGA Declaratory Ruling*, ¶¶ 11, 28-31.

<sup>5</sup> *EEI/AGA Declaratory Ruling*, ¶ 11.



critical and potentially life-saving service messages, and decreases the costs associated with notifying customers.<sup>6</sup>

In February 2015, EEI and AGA filed a Petition for Expedited Declaratory Ruling out of a concern (caused by a flurry of litigation) that the FCC’s rules might be interpreted to preclude energy utility companies from using automated technologies to provide their customers with important service-related information.<sup>7</sup> EEI and AGA specifically requested the FCC confirm, under the TCPA, that providing a wireless telephone number to an energy utility constitutes “prior express consent” to receive, at that number, non-telemarketing, informational calls related to the customer’s utility service, which are placed using an autodialer or an artificial or prerecorded voice.<sup>8</sup>

In granting in large part the EEI/AGA Petition, the FCC confirmed the “prior express consent” interpretation and recognized the importance of these calls, the benefits to be derived therefrom, and that these were the types of calls which customers wished to receive.<sup>9</sup> The FCC’s approach received broad support from numerous other commentators and entities such as the National Association of Regulatory Utility Commissioners.<sup>10</sup>

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<sup>6</sup> See *EEI/AGA Declaratory Ruling*, ¶¶ 28-31 & Statement of Commissioner M. O’Rielly.

<sup>7</sup> *Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278, filed by Edison Electric Institute and American Gas Association on Feb. 12, 2015 (*EEI/AGA Petition*).

<sup>8</sup> *EEI/AGA Declaratory Ruling*, ¶ 9; see *EEI/AGA Petition*.

<sup>9</sup> *EEI/AGA Declaratory Ruling*, ¶¶ 28-31.

<sup>10</sup> *EEI/AGA Declaratory Ruling*, ¶¶ 34; *Reply Comments of the National Association of Regulatory Utility Commissioners*, CG Docket Nos. 02-278 (filed April 13, 2015).

Founded in 1889, the National Association of Regulatory Utility Commissioners (NARUC) is a non-profit organization dedicated to representing the State public service commissions who regulate the utilities that provide essential services such as energy, telecommunications, power, water, and transportation. NARUC’s members include all 50 States, the District of Columbia, Puerto Rico, and the Virgin Islands. Most State commissioners are appointed to their positions by their Governor or Legislature, while commissioners in 14 States are elected. See About NARUC, <https://www.naruc.org/about-naruc/about-naruc/>, last visited March 2, 2017.

### III. The Moskowitz Petition Should Be Denied.

Just a few months ago, the FCC carefully considered and clarified what constitutes “prior express consent” in the context of the critical and beneficial role autodialed utility-service messages play in public safety.<sup>11</sup> In its August 4, 2016 *EEI/AGA Declaratory Ruling*, the FCC found that when utility customers provide their cellphone numbers to the utility they thereby *expressly* consent to receive automated calls “reasonably and closely related to . . . utility service.”<sup>12</sup> In so ruling, the FCC determined that customers generally “welcome” alerts about “extreme weather conditions approaching that might cause service outages,” “utility repair work in their immediate vicinity,” or “tree trimming or meter reading that may be conducted on their property or near their residence.”<sup>13</sup> It also added that “speeding the dissemination of information regarding service interruptions or other potential public safety hazards can be critically important.”<sup>14</sup>

Although the Moskowitz Petition does not mention the *EEI/AGA Declaratory Ruling*, the single rule which is proposed would redefine “prior express consent” to require onerous conditions far beyond a utility customers’ voluntary provision of his or her phone number,<sup>15</sup> in direct abrogation of the *EEI/AGA Declaratory Ruling* and more than twenty years of Commission precedent, and potentially placing utility customers in harm’s way. The FCC makes determinations as to whether “prior express consent” has been given on a case-by-case basis, and its rulings on this issue are narrowly tailored. The FCC’s TCPA declaratory rulings as they apply to energy company service-related automated calls and texts are likewise narrowly tailored and provide clear and compelling public benefits. For example, courtesy calls about delinquent

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<sup>11</sup> *EEI/AGA Declaratory Ruling*; see *EEI/AGA Petition*.

<sup>12</sup> *EEI/AGA Declaratory Ruling*, ¶ 18 (emphasis added).

<sup>13</sup> *EEI/AGA Declaratory Ruling*, ¶ 30.

<sup>14</sup> *EEI/AGA Declaratory Ruling*, ¶ 28 (emphasis added).

<sup>15</sup> See Petition at 37-38 & Appendices A & B.

payments help individuals avoid the expense and inconvenience of disconnection, and calls about planned outages help them prepare in advance. It would defy belief to imagine that a customer who has given a telephone number to an energy company in the course of obtaining service would not want to receive and has not agreed to receive important, time-sensitive, service related calls from the company. The Moskowitz Petition also fails to acknowledge that individuals can exercise their right to opt-out at any time if they no longer care to receive them. The Moskowitz Petition has not in any way demonstrated a need for the FCC to reverse the *EEI/AGA Declaratory Ruling* or any other rulings regarding what constitutes “prior express consent” to receive non-telemarketing, informational calls and texts.

**a. The TCPA is a broad statute and the Commission has flexibility to interpret its “prior express consent” provision.**

The Moskowitz Petition is premised on the fallacy that the TCPA is a narrow statute whose definition of “prior express consent” requires explicit “written” consent, despite the requirement not appearing in the statute. From that false premise, the Moskowitz Petition concludes that any less restrictive definition of “prior express consent” promulgated by the FCC runs afoul of *Chevron* and will, ultimately, be overturned by a Circuit Court. Such a bleak outlook, however, is contradicted by the broad nature of the TCPA, the flexibility of its interpretation afforded to the FCC, and many years of FCC precedent and stakeholder expectations.

**i. The TCPA does not define “prior express consent,” leaving it to the FCC’s discretion.**

The TCPA prohibits non-emergency autodialed calls unless the caller has the “prior express consent” of the called party, but does not define the exact contours of what called party

actions or statements constitute “prior express consent.”<sup>16</sup> Where a statute is ambiguous, the implementing agency is empowered with discretion to interpret the “gray area” in the statute.<sup>17</sup>

Indeed, in its 2012 TCPA Order examining the contours of “prior express consent” in the telemarketing and advertising context, the FCC ruled that

the TCPA is silent on the issue of what form of express consent – oral, written, or some other kind – is required for calls that use an automatic telephone dialing system or prerecorded voice to deliver a telemarketing message. Thus, the Commission has discretion to determine, consistent with Congressional intent, the form of express consent required.<sup>18</sup>

In the *2012 TCPA Order*, the FCC revised its rules to require prior express written consent for telemarketing messages to wireless numbers and residential lines, but the FCC declined to apply the written consent requirement to non-telemarketing, informational messages.<sup>19</sup>

In July 2015, the FCC further explained that “[a]lthough prior express consent is required for autodialed or prerecorded non-telemarketing voice calls and texts, neither the Commission’s rules nor its orders require any specific method by which a caller must obtain such prior express consent.”<sup>20</sup> Moreover, the FCC’s exercise of its discretion to interpret the broad statutory language of “prior express consent” is not a new development. For example, the FCC confronted the issue in 1992 and stated that it was rejecting TCPA definitions that fit “only a narrow set of

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<sup>16</sup> 47 U.S.C. § 227(b)(1)(A) & (B).

<sup>17</sup> *Cellco Partnership v. FCC*, 700 F.3d 534, 547 (D.C. Cir. 2012); *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

<sup>18</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1831, ¶ 21 (2012) (*2012 TCPA Order*).

<sup>19</sup> See *2012 TCPA Order*, 27 FCC Rcd 1830.

<sup>20</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, American Association of Healthcare Administrative Management Petition for Expedited Declaratory Ruling, et al.*, CG Docket No. 02-278, 30 FCC Rcd at 8020, Declaratory Ruling and Order, ¶ 49 (July 10, 2015) (*2015 Omnibus TCPA Declaratory Ruling*) (citing *2012 TCPA Order*, 27 FCC Rcd at 1842, ¶ 29).

circumstances” in favor of “*broad* definitions which best reflect[ed] legislative intent by accommodating the full range of telephone services and telemarketing practices.”<sup>21</sup>

Indeed, the FCC has even taken care to ensure that its interpretations of “prior express consent” are not too broad as to offend *Chevron*. After clarifying in the *EEI/AGA Declaratory Ruling* that a customer’s provision of his or her phone number to a utility company constitutes “prior express consent” for service-related autodialed calls, the FCC explained “[t]his relief is not . . . a blanket exemption from the TCPA for utility companies; we are reasonably interpreting the scope of utility customers’ consent.”<sup>22</sup> Given the statutory ambiguity of “prior express consent” long recognized by the FCC, *Chevron* places a single limit on the FCC’s discretion: that the interpretation not be arbitrary and capricious.<sup>23</sup>

**ii. It is arbitrary and capricious for the FCC to upend its well-established precedent and stakeholder expectations.**

An agency’s statutory interpretation is arbitrary and capricious when it reflects a complete disconnect between the facts found and the choice made.”<sup>24</sup> Consequently, “[a] ‘reasonable’ explanation of how an agency’s interpretation serves the statute’s objectives,” therefore, “is the stuff of which a ‘permissible’ construction is made” under *Chevron*.<sup>25</sup> “A statutory interpretation . . . that results from an unexplained departure from prior [agency] policy and practice is not a reasonable one.”<sup>26</sup>

The FCC has long interpreted “prior express consent” for non-telemarketing, informational calls and texts to include a customer’s provision of his or her phone number in connection with receiving services. Accordingly, in the 2016 *EEI/AGA Declaratory Ruling*, the

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<sup>21</sup> 1992 TCPA Order, 7 FCC Rcd at 8754, ¶ 6 (emphasis added).

<sup>22</sup> *EEI/AGA Declaratory Ruling*, ¶ 30.

<sup>23</sup> *Nat. Ass’n of Regulatory Utility Commissioners v. ICC*, 41 F.3d 721, 726-27 (D.C. Cir. 1994).

<sup>24</sup> *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

<sup>25</sup> *Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145, 156 (D.C. Cir. 2005).

<sup>26</sup> *Goldstein v. SEC*, 451 F.3d 873, 883 (D.C. Cir. 2006).

FCC explicitly ruled that when utility customers provide their cellphone numbers to the utility they thereby *expressly* consent to receive automated calls “reasonably and closely related to . . . utility service.”<sup>27</sup> Given the circumstances under which a customer typically gives his or her number, this should qualify as “prior express consent” even under the Moskowitz Petition’s faulty view of the law.

The FCC’s interpretation of “prior express consent” in the 2016 *EEI/AGA Declaratory Ruling* follows 25 years of precedent. In the *1992 TCPA Order*, the FCC found that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”<sup>28</sup> The FCC has clarified this finding in subsequent orders, concluding in the *ACA Order* in 2008 that “the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.”<sup>29</sup> Six years later, in the *GroupMe Order*, the Commission clarified that the *ACA Order* “make[s] clear that consent to be called at a number in conjunction with a transaction

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<sup>27</sup> *EEI/AGA Declaratory Ruling*, ¶ 29 (emphasis added) (citing *1992 TCPA Order*, 7 FCC Rcd at 8769, ¶ 31).

<sup>28</sup> *1992 TCPA Order*, 7 FCC Rcd at 8769, ¶ 31.

<sup>29</sup> *Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, Order, FCC 07-232, 23 FCC Rcd 559, ¶ 9 (2008) (“*ACA Order*”) (“In the *1992 TCPA Order*, the Commission determined that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.” The legislative history in the TCPA provides support for this interpretation. Specifically, the House report on what ultimately became section 227 states that:

[t]he restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications.

We emphasize that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.”).

extends to a wide range of calls ‘regarding’ that transaction.”<sup>30</sup> The *2012 TCPA Order* also noted that customers can provide prior express consent for limited purposes, such as service-related calls, by providing a wireless number to a calling party.<sup>31</sup>

In light of the 2016 *EEI/AGA Declaratory Ruling*, 25-years of consistent FCC precedent, and the stakeholder expectations that the rules and ruling have engendered, if the FCC were to suddenly depart from its own precedent broadly interpreting “prior express consent”—as the Moskowitz Petition requests—then the new interpretation of the “prior express consent” requirement will be unreasonable under *Chevron*.

**b. The public will be negatively impacted if the FCC grants the Moskowitz Petition.**

The FCC issued the *EEI/AGA Declaratory Ruling* to protect public safety. As the FCC found in the *EEI/AGA Declaratory Ruling*, autodialed service-related calls and texts by energy utilities provide critical and compelling public benefits.<sup>32</sup> “[T]he speed[y] dissemination of information regarding service interruptions or other potential public safety hazards [enabled by autodialers] can be critically important.”<sup>33</sup> “In fact, the Commission has long recognized that ‘[s]ervice outages and interruptions in the supply of water, gas or electricity could in many instances pose significant risks to public health and safety, and the use of prerecorded message

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<sup>30</sup> *GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, FCC 14-33, 29 FCC Rcd 3442, ¶ 11 (2014) (“*GroupMe Order*”). The *ACA Order* and *GroupMe Order* also made clear that consent for certain calls may be made through intermediaries such that “[c]alls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call,” *ACA Order* ¶ 10, and that “a consumer’s prior express consent may be obtained through and conveyed by an intermediary.” *GroupMe Order* ¶ 6. Under these two rulings, then, calls reporting an outage to a utility customer by, for instance, the customer’s transmission and distribution provider, rather than by the customer’s retail energy service provider (as would typically be the case in states like Texas, where electric service is deregulated), would not violate the TCPA.

<sup>31</sup> *2012 TCPA Order*, ¶ 25.

<sup>32</sup> *EEI/AGA Declaratory Ruling*, ¶¶ 28-30.

<sup>33</sup> *EEI/AGA Declaratory Ruling*, ¶ 28.

calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public.”<sup>34</sup> The FCC further found that numerous types of service-related calls are “critical to providing safe, efficient and reliable service[,]” including calls that

warn about planned or unplanned service outages; provide updates about service outages or service restoration; ask for confirmation of service restoration or information about lack of service; provide notification of meter work, tree trimming, or other field work that directly affects the customer’s utility service; notify consumers they may be eligible for subsidized or low-cost services due to certain qualifiers such as, *e.g.*, age, low income or disability; and calls that provide information about potential brown-outs due to heavy energy usage.<sup>35</sup>

Not only are automated service-related calls and texts critical to public safety, but customers also prefer to receive these types of communications because they are shorter and more direct than a manual phone conversation with a customer service employee.<sup>36</sup> Indeed, as the FCC acknowledged in the *EEI/AGA Declaratory Ruling*, consumers have generally demanded calls from their regulated energy utilities about their service, and have complained when they have not received such calls.<sup>37</sup> After reviewing substantial evidence of customer preferences, the FCC found “that many customers would welcome alerts warning them of extreme weather conditions approaching that might cause service outages, alerts about utility repair work in their immediate vicinity that might inconvenience them, or alerts notifying them

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<sup>34</sup> *EEI/AGA Declaratory Ruling*, ¶ 29 (quoting *1992 TCPA Order*, 7 FCC Rcd at 8778, ¶51).

<sup>35</sup> *EEI/AGA Declaratory Ruling*, ¶ 30 (citations to the evidentiary record omitted).

<sup>36</sup> See Press Release, J.D. Power & Associates, *Price and Billing/Payment are Primary Drivers of Increased Overall Customer Satisfaction with Electric Residential Utilities* (July 17, 2013) (noting that “improved communications during long outages increases satisfaction” and that “Satisfaction increases when utilities proactively communicate outage information regularly and clearly via the channels customers prefer, including utility-initiated phone calls, emails, text messages and social media sites.”).

<sup>37</sup> *EEI/AGA Declaratory Ruling*, nn.51, 106; see also, Press Release, Sen. Charles Schumer, *During Fall Storm, Tens of Thousands of Hudson Valley Customers Were Left in the Dark About When Power Would Come Back On*, 2011 WLNR 26407672 (Dec. 21, 2011) (noting that utilities covering the Hudson Valley did not effectively communicate with customers about major power outage or its expected duration).



of tree trimming or meter reading that may be conducted on their property or near their residence.”<sup>38</sup> The FCC has even recognized that “low-income households—especially those in urban and minority communities more reliant upon wireless phones as their primary source of communications—are particularly vulnerable to service interruptions, making it even more imperative that they receive appropriate notice, especially before, during and after emergency situations.”<sup>39</sup> As Commissioner O’Rielly noted, utility service-related messages are “valuable” and “vital”:

Autodialing or texting can be a lifesaver. Similarly, homeowners and renters of all make-ups, including the elderly, can benefit when utilities call or text residents to let them know it is safe to return home after an outage. Just imagine those citizens who await the all clear signal after a gas leak in a neighborhood, their daily lives disrupted as they find shelter at neighbors, friends, community centers or otherwise.<sup>40</sup>

To the extent an energy utility customer prefers *not* to receive critical non-emergency, but automated, service-related messages, the FCC has already made clear that an energy customer “may revoke consent in any reasonable manner that clearly expresses a desire not to receive further messages, and callers may not infringe on that ability by designating an exclusive means to revoke consent.”<sup>41</sup> Thus, the Moskowitz Petition does not even enhance the one public “benefit” it is premised on protecting.

If the Commission grants the Moskowitz Petition and restrictively rewrites the definition of “prior express consent,” then energy customers will not receive important service updates as reliably, quickly, or efficiently. In some cases the public’s safety would be at risk. Additionally, energy customers could bear the increased costs of energy service caused by higher

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<sup>38</sup> *EEI/AGA Declaratory Ruling*, ¶ 30 (citations to the evidentiary record omitted).

<sup>39</sup> *EEI/AGA Declaratory Ruling*, ¶ 30 (citations to the evidentiary record omitted).

<sup>40</sup> *EEI/AGA Declaratory Ruling*, Statement of Commissioner M. O’Rielly.

<sup>41</sup> *EEI/AGA Declaratory Ruling*, ¶ 33 (citing *See 2015 Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd at 7996, ¶63).

communications and administrative costs related to a prohibition of automated calls or text messages for important service announcements. Ultimately, the public will be robbed of the critical benefits that these communications provide, contrary to both the public's benefit and preferences.

**c. Energy Utility Respondents' members will be negatively impacted if the FCC grants the Moskowitz Petition.**

Energy Utility Respondents' members will be uniquely and negatively impacted because granting the Moskowitz Petition will effectively overturn the *EEI/AGA Declaratory Ruling* on which they have relied. The *EEI/AGA Declaratory Ruling* and other previous FCC rulings and orders set the expectation that, absent a customer's clear revocation of consent to receive automated service-related calls or texts, the customer's provision of his phone number to his utility constitutes "prior express consent."<sup>42</sup> Nonetheless, only a few months ago, the FCC

"strongly encourage[d] utility companies, and all robocallers, to inform customers during the service initiation process or when updating contact information on the account as an additional safeguard that, by providing a wireless telephone number to them, the customer consents to receiving autodialed and prerecorded message calls at that number, to the extent such calls are closely related to the service purchased by the customer."<sup>43</sup>

But under the Moskowitz Petition's onerous rewrite of "prior express consent," TCPA compliance for automated service-related calls demands far more: prior express *written* consent wherein a customer provides his signature, "specifically" agrees "to receive[] autodialed and/or artificial voice/prerecorded calls . . . at a specified telephone number," that consent can never be "implied by the conduct of the person to be called . . . or by the called person's . . . transaction(s) or relationship(s) with the [utility company]," that consent given "as a condition" of obtaining service is invalid, and that the utility company cannot require consent as a condition of obtaining

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<sup>42</sup> *EEI/AGA Declaratory Ruling*, ¶¶ 28-34.

<sup>43</sup> *EEI/AGA Declaratory Ruling*, ¶ 31.

service.<sup>44</sup> As if these numerous conditions were not burdensome enough, the Moskowitz Petition’s proposed rule also prohibits the transmission of consent through an intermediary<sup>45</sup> and requires energy utilities to “clearly disclose” all of these conditions on consent, potentially *invalidating* all previously obtained customer express consents.<sup>46</sup>

Thus, utility customers’ provision of their telephone numbers to their utilities in connection with their service agreements and current “prior express consent” provisions in service agreements will no longer be interpreted as consent to receive automated calls and texts concerning the utility service. Consequently, if the FCC adopts the rule the Moskowitz Petition proposes or otherwise clarifies that a utility customer’s provision of his phone number to a utility does not in and of itself constitute “prior express consent,” energy utilities will be forced to immediately discontinue the practice until and unless they obtain the new “prior written express consent.”

Such a requirement will prevent energy companies from sending critical, urgent, and potentially life-saving service-related messages in a timely and efficient manner. Commissioner O’Rielly has criticized interpreting “prior express consent” to exclude a customer’s provision of his phone number to the utility in conjunction with receiving service as an “overly restrictive, unrealistic, and unworkable” interpretation of the TCPA,<sup>47</sup> yet the Moskowitz Petition suggests going much further. Thus, if the Moskowitz Petition is granted, “the only legal option for the

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<sup>44</sup> Moskowitz Petition at 37-38 & Appendices A & B.

<sup>45</sup> Under this prohibition, calls reporting an outage to a utility customer by, for instance, the customer’s transmission and distribution provider, rather than by the customer’s retail energy service provider (as would typically be the case in states like Texas, where electric service is deregulated), will violate the TCPA even if the customer provided the new “prior written express consent” to his retail energy service provider.

<sup>46</sup> Moskowitz Petition at 37-38 & Appendices A & B.

<sup>47</sup> *EEI/AGA Declaratory Ruling*, Statement of Commissioner M. O’Rielly.

company to pursue . . . is to manually dial each and every subscriber, all to the detriment of resources to assist those in need or detect and solve the problem at hand.”<sup>48</sup>

Nor will obtaining the proposed “prior written express consent” be easy or fast. Energy utilities provide service to 262 million Americans across the entire breadth and width of the United States. Administrative and customer service costs will needlessly and dramatically increase as each utility company redrafts its service agreements or tariffs and spends what will likely be months or even years manually contacting each and every customer to obtain a signature attesting to the new “prior written express consent.” Because consent cannot be obtained from all customers at once and new or continued service cannot be conditioned on the receipt of consent, each company will also be forced to create, maintain, and staff parallel manual and autodialed messaging systems—another onerous, expensive, and dangerous result of the Moskowitz Petition’s proposed rule. Until and unless they are able to contact and obtain the “prior express written consent” of every current and future customer, regulated energy utilities will potentially be subject to *billions* of dollars in liability under the TCPA.<sup>49</sup> As EEI previously noted,

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<sup>48</sup> *EEI/AGA Declaratory Ruling*, Statement of Commissioner M. O’Rielly.

<sup>49</sup> The TCPA includes a statutory penalty of \$500 per violation and the possibility of treble damages. 47 U.S.C. §227(b)(3). As explained in the EEI/AGA Petition granted by the FCC in 2016,

One EEI member is currently defending a suit in the Northern District of Illinois that sadly illustrates the risk energy companies bear for doing the right thing. Commonwealth Edison (“ComEd”), hoping to improve the speed and efficiency of its communications with customers, adopted a “Power Outage Alert Program,” a two-way text-messaging program designed to allow ComEd to inform customers of power outages by text message, and to allow customers to report an outage to the utility by text message. ComEd rolled this program out to all customers who provided a wireless telephone number as their contact number. The first message ComEd sent to enrollees informed them of the program and gave instructions on how to opt out, in case any of those customers did not want to receive the informational text messages. Proving that no good deed goes

the mere threat of such an improper application of the Commission's TCPA rules to these utility/customer communications may have begun to have a chilling effect because given the nature of their service and the large number of their customers, energy utilities must place a premium on regulatory compliance and are loathe to act in the face of ambiguous regulatory standards . . . . In the long run, other EEI members might have to consider curtailing their customer communications effort in the face of continued uncertainty regarding the application of the Commission's rules. Not only would this unanticipated effect be unfortunate, but it would also run contrary to the public interest.<sup>50</sup>

Moreover, the inevitable reduction in service-related messaging that will be caused by adopting the Moskowitz Petition's proposed rule runs contrary to the dictates of state commissions and other entities and agencies that regulate many of Energy Utility Respondents' members. For example, state regulations mandate some notification programs.<sup>51</sup> In other cases, EEI and AGA members have adopted these programs at the urging of regulatory authorities.<sup>52</sup> In the case of electric cooperatives, some have adopted these programs in response to regulatory authorities and others have done so at the direction of their democratically elected Board of Directors. As their regulators and customers rightly expect, energy utility companies are

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unpunished, that initial message landed ComEd in federal district court, facing a class action suit with potential damages that could range between \$600 million and \$1.8 billion.

EEI and AGA Petition for Declaratory Order, FCC Docket No. 02-278, at 10-11, 13 (citing *Grant v. Commonwealth Edison*, No. 1:13-cv-08310 (N.D. Ill.)). The case was later settled. Similarly situated utilities face comparable liability risks simply for providing their customers with outage alerts.

<sup>50</sup> Letter from H. Russell Frisby, Jr. Counsel, Edison Electric Institute, to Marlene H. Dortch, Secretary, FCC, CG

02-278, (June 25, 2014). In some cases, this result would also be in conflict with state regulations. *See, e.g., infra* n.51.

<sup>51</sup> *See, e.g., The Board's Review of The Utilities' Response to Hurricane Irene*, Order Accepting Consultant's report and Additional Staff Recommendations and Requiring Electric Utilities to Implement Recommendations, Docket No. EO11090543, Recommendation 23-G-3 (Bd. of Pub. Utils., N. J., Jan. 23, 2013) (recommending that utilities "provide additional methods to report and check on the status of an individual outage" including via text messaging).

<sup>52</sup> *See* Letter from Aryeh Fishman, Associate General Counsel, Edison Electric Institute, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (June 5, 2014) ("EEI June 5 2015 Ex Parte").

sensitive to customer complaints and strive to improve customer service by doing what they can to reach out to consumers about service-related issues.<sup>53</sup>

Thus, granting the Moskowitz Petition and eliminating a utility company's ability to rely on its customer's provision of his phone number or current "prior express consent" clauses in service agreements as "prior express consent" to receive autodialed service-related messages will force utility companies to start over at tremendous expense and, through its chilling effect, contradict the edicts and encouragement of utility regulators and state commissions to *increase* communication with the public through the channels (autodialed calls and text messages) most used and preferred by the public.

**d. The Moskowitz Petition has not demonstrated any need for the FCC to reverse the *EEI/AGA Declaratory Ruling*.**

The Moskowitz Petition offers no significant counterweight to the dangerous and damaging effects it will have on the public and on regulated energy utilities. The Moskowitz Petition merely proffers a restricted interpretation of "prior express consent," suggests that some previous FCC rulings might be contradictory in certain circumstances, raises the possibility that eventually a Circuit Court may issue an opinion confirming the Moskowitz Petition's restrictive interpretation (although none yet has), and implies that the "public" might benefit from decreased telemarketing and debt collection calls if the single restrictive rule were adopted.

From a *Chevron*-based statutory interpretation perspective, however, the Moskowitz Petition ignores that for 25 years the FCC has broadly and flexibly interpreted "express consent"

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<sup>53</sup> State public utilities commissions, in fact, pay careful attention to customer satisfaction with utilities; some states allow utilities with high customer satisfaction ratings to collect performance bonuses from customers. See Elizabeth Douglas, *Edison Fined \$30 Million for Fraud*, L.A. TIMES (Sept. 19, 2008) available at <http://articles.latimes.com/2008/sep/19/business/fi-edison19> (discussing falsified customer satisfaction records by Edison that allowed it to collect ratepayer-funded incentives for good performance).

to include situations where a customer provides his phone number to the caller<sup>54</sup> without an overruling by a Circuit Court or Congress. Nonetheless, the Moskowitz Petition speculates that eventually that may change.<sup>55</sup> Even if so—and Energy Utility Respondents dispute that it will—the FCC cannot rely on speculation, and must instead only make rules or issues orders that reflect a connection “between the facts found and the choice made.”<sup>56</sup> Yet the Moskowitz Petition offers few facts and fewer connections between its ultra-restrictive proposed rule and the speculative rationales it identifies.

Nor does the Moskowitz Petition present any evidence supporting its implied public benefits of reduced telemarketing and debt collection calls.<sup>57</sup> To the extent there are any actual benefits, the Moskowitz Petition completely ignores and fails to weigh the tremendous harms to the public and energy utilities, discussed above, that will be wrought by its proposed rule. Accordingly, the Moskowitz Petition does not demonstrate any need or substantial benefit for the FCC to overrule its *EEI/AGA Declaratory Ruling* by rewriting its “prior express consent” interpretation into an overly restrictive one-size-fits-none definition.

#### **IV. Conclusion.**

WHEREFORE, for the reasons stated above, Energy Utility Respondents respectfully request that the Commission deny the Moskowitz Petition and, at least as to energy utility companies, preserve its only months-old *EEI/AGA Declaratory Ruling*.

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<sup>54</sup> See 1992 TCPA Order.

<sup>55</sup> Moskowitz Petition at 16-30.

<sup>56</sup> *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

<sup>57</sup> See Moskowitz Petition at 3, 38-39.

Respectfully submitted,

AMERICAN GAS ASSOCIATION  
/s/ Michael L. Murray

EDISON ELECTRIC INSTITUTE  
/s/ H. Russell Frisby, Jr.

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION  
/s/ Tracy P. Marshall

**Edison Electric Institute**

H. Russell Frisby, Jr.  
Brandon R. Nagy  
STINSON LEONARD STREET LLP  
1775 Pennsylvania Avenue NW, Suite 800  
Washington, DC 20006  
(202) 785-9100  
(202) 785-9163 (fax)

Aryeh B. Fishman  
Associate General Counsel,  
Regulatory Legal Affairs

EDISON ELECTRIC INSTITUTE  
701 Pennsylvania Avenue, NW  
Washington, DC 20004-2696  
(202) 508-5000

*Counsel to the Edison Electric Institute*

**American Gas Association**

Michael L. Murray  
Deputy General Counsel  
AMERICAN GAS ASSOCIATION  
400 N. Capitol St., NW  
Washington, DC 20001  
(202) 824-7071

Jim Linn  
Managing Director, Information Technology

AMERICAN GAS ASSOCIATION  
400 N. Capitol St., NW  
Washington, DC 20001  
(202) 824-7272

*Counsel to the American Gas Association*

**National Rural Electric Cooperative Association**

Tracy P. Marshall  
KELLER AND HECKMAN LLP  
1001 G Street NW, Suite 500  
Washington, DC 20001  
(202) 434-4100  
(202) 434-4646 (fax)

Martha A. Duggan  
Senior Director, Regulatory Affairs

NATIONAL RURAL ELECTRIC COOPERATIVE  
ASSOCIATION  
4301 Wilson Blvd.  
Arlington, VA 22203  
(703) 907-5848

*Counsel to the National Rural Electric  
Cooperative Association*

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